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No. 90-953

In the Supreme Court of the United States

October Term, 1990

CITY GAS COMPANY OF FLORIDA,
Petitioner

vs.

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Eleventh Circuit below affirmed the holding of the district court that petitioner is liable for three separate and distinct violations of § 2 of the Sherman Act, 15 U.S.C. § 2. First, petitioner acquired and maintained monopoly power by virtue of an agreement with its only major competitor not to compete in each other's territory. Second, City Gas abused its monopoly power by refusing to deal with respondent, and this refusal violated § 2 under both the essential facilities doctrine and the intent to monopolize test. Third, City Gas engaged in a series of anti-competitive and predatory acts which, when viewed collectively, constituted an abuse of petitioner's monopoly power in violation of § 2.

Petitioner herein challenges the court's finding of liability under the essential facilities doctrine, contending that it does not possess monopoly power and that its pipelines do not constitute an essential facility. Petitioner also claims that the conduct held to constitute two of the three § 2 violations — *i.e.* the territorial agreement and the refusal to deal — is immune under the state action doctrine. Petitioner does not however, challenge the finding below that it violated § 2 by engaging in a pattern of anticompetitive conduct with the specific intent to monopolize. Because of this failure, a finding of monopoly power in this case mandates an affirmance of petitioner's liability. Thus, in large part, the questions presented by petitioner, even if resolved in petitioner's favor, would not change the outcome of this litigation. Nevertheless, as will be more fully clarified below, petitioner has seen fit to misrepresent crucial facts in its statement of questions

presented and, for that reason, the petitioner's questions are fairly restated as follows:

I. Whether the conclusion of the Eleventh Circuit that petitioner violated § 2 of the Sherman Act under the essential facilities doctrine warrants further review by this Court?

II. Whether the conclusion of the Eleventh Circuit that petitioner's conduct is not immune from antitrust liability under the state action doctrine warrants further review by this Court?

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STATEMENT OF THE CASE

Petitioner contends that the finding of antitrust liability upon multiple grounds under § 2 of the Sherman Act, first by the district court, then by a unanimous three judge panel of the Eleventh Circuit and, finally, by a majority of seven judges of the Eleventh Circuit sitting en banc, constitutes some sort of aberration and a "perversion" of applicable legal principles. This most emphatically is not so. Actually, the parties differ little in their views of the legal principles, it now appears to be the facts that petitioner places into dispute for the first time.

Crucial "facts" set forth in the petition and hence the statement of questions presented by petitioner bear no resemblance to the established facts of this case. Throughout the appellate process, petitioner has consistently asserted that it sought review only of the legal principles applied to the facts as found by the district court below. As the Eleventh Circuit noted in its panel opinion,[1] "[t]he district court's opinion contains a complete recitation of the facts and procedural history of this case . . . City Gas does not challenge the factual findings made by the district court . . ." [Pet. App. A-1, A-3]. When the well settled legal principles previously articulated by this Court are applied to what have throughout these proceedings been the unchallenged facts established by the district court,[2] it becomes clear that this case is fully in accord with settled antitrust principles and that there simply is no conflict with holdings of other circuit courts of appeal.

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[1] The panel opinion of the Eleventh Circuit was presented as petitioner's Appendix A and is referenced herein as such.

[2] The opinion of the district court was presented as petitioner's Appendix D and is referenced herein as such.

Respondent, Consolidated Gas Company of Florida, Inc. ("Consolidated"), is a retail distributor of liquid petroleum ("LP") gas in southern Dade County, Florida. Petitioner, City Gas Company of Florida ("City Gas") is a major distributor of natural gas in Florida, having approximately 100,000 customers. City Gas purchases natural gas from Florida Gas Transmission ("FGT"), the only *interstate pipeline* supplier of natural gas into Florida.[3]

Natural gas distributors are regulated public utilities. The Florida Public Service Commission ("FPSC") regulates the retail sales by natural gas distribution companies to residential and commercial customers. Although petitioner, at every conceivable opportunity throughout its petition, states that the rates, service and operation of Florida natural gas distributors are "pervasively regulated" by the FPSC, this again contravenes the facts City Gas agreed were uncontested. The district court found that the FPSC's regulation of natural gas distributors is not all-inclusive and that critical aspects of a natural gas distributor's business conduct either are not regulated at all by the FPSC or only are addressed on a hit-or-miss basis. Indeed, the evidence was uncontroverted that Florida's regulatory scheme is incomplete even with respect to rates as it does not constrain a

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[3] City Gas, in its petition, falsely states that it purchases all of its natural gas supply from FGT and mischaracterizes FGT as the "only wholesale supplier" of natural gas in Florida. This is not so. It was established that City Gas also purchases natural gas at wholesale from Peoples Gas System, Inc. ("Peoples") and that, as of the date of the trial, City Gas was party to a contract to sell natural gas at wholesale to Florida Gas on demand. The district court found that, within the relevant geographic market, City Gas was the only source of natural gas. FGT's pipelines outside of the relevant market are simply irrelevant to that finding.

utility's ability to exploit a monopolistic position. [Pet. App. D-7].

In 1960, City Gas entered into a territorial agreement with Peoples, its only *major* competitor. Under the terms of the agreement, City Gas and Peoples, the two largest natural gas companies in Florida, divided up south Florida into areas to be served by each and each company promised not to compete in the other's territory. While the agreement eliminated all competition between City Gas and Peoples, there were existing smaller natural gas companies within the service areas each reserved to itself which were left to compete with the two industry giants in those two territories. City Gas' pipes and its assumed service area totally surround Miller Gas, a smaller natural gas company inside the territory City Gas reserved to itself in the Peoples agreement. Consolidated Gas as well is totally surrounded by City Gas' pipes and self proclaimed service area.

The territorial agreement between City Gas and Peoples is the only one in the state between natural gas distributors. [Pet. App. A-11]. The agreement contains no provision making it contingent on FPSC approval but after it was placed into effect, FPSC approval was sought and later obtained. The district court found that the FPSC has regulated the agreement only on a hit-or-miss basis. Such an agreement is not required to be approved by the FPSC, it only is considered when a utility requests FPSC approval and it is subsequently reviewed only if a complaint is filed with the FPSC. [Pet. App. D-7]. In 1962, Peoples filed a circuit court action against City Gas alleging violation of the agreement. City Gas defended on the basis that the agreement was violative both of Florida's 1915 anti-monopoly law and the Sherman Act. The case proceeded through the state court system and, in

1965, the Florida supreme court held that the FPSC has implied power to validate such agreements. The court, however, refrained from addressing the applicability of the Sherman Act. *City Gas Co. v. Peoples Gas System, Inc.*, 182 So.2d 429 (Fla. 1965).

Because the same underground system used for LP gas distribution is suitable for natural gas distribution, an LP system located near a natural gas pipeline may be converted to natural gas on an economically feasible basis. By early 1982, City Gas had established a pattern of eliminating all potential competition by acquiring tiny LP companies located within its territory and preempting any efforts those companies may have made to convert to natural gas distribution. Because City Gas' pipelines surrounded the area served by these potential competitors, City Gas' acquisition strategy included installation of lines and conversion of some of the companies' LP customers to natural gas, reducing the revenues of the LP companies and leaving them with no choice but to sell their systems to City Gas at bargain prices.

On February 22, 1982, City Gas' Board of Directors was advised that City Gas was seeking to acquire Consolidated Gas and it authorized its officers to take whatever steps were necessary to acquire the assets of Consolidated. But Consolidated was not contacted by anyone at City Gas regarding City Gas' interest in purchasing the company. Instead, City Gas commenced its acquisition strategy the next day by beginning a full scale campaign to solicit away Consolidated's customers.

On March 9, 1982, Consolidated commenced its efforts to switch from LP gas to natural gas by contacting the FGT and requesting that the FGT construct the necessary connection facilities and supply it with natural

gas. Consolidated was advised that it was required to obtain a natural gas allocation from the FERC to buy direct from FGT and that it would be required to pay the cost of the interconnection, then estimated to be approximately $250,000.00. City Gas had received ten connections with the FGT without paying the costs and, to avoid this expenditure, FGT suggested that Consolidated arrange for a connection with City Gas' system.

On April 5, 1982, City Gas began extending its pipelines to serve some of Consolidated's customers. In so doing, City Gas duplicated Consolidated's pipelines serving those same customers. City Gas' solicitations and pipeline extensions to take selected customers from Consolidated were basic components of a strategy designed to force Consolidated to sell out at a low price, the same strategy that City Gas had successfully employed with respect to its other potential competitors.

On May 21, 1982, ~~City Gas~~ Consolidated applied to the FERC for a natural gas allocation. City Gas intervened in that proceeding, asserting numerous factual disputes that would otherwise not have been presented. City Gas also argued that, if Consolidated's application was granted, Consolidated should be required to pay the $250,000.00 cost of the FGT connection. The court found that City Gas' intervention raising factual disputes profoundly altered the course and nature of the consideration of Consolidated's application by the FERC, causing a delay in the proceedings of more than one year during which time City Gas took all but one of Consolidated's commercial customers and some of Consolidated's residential customers.[4]

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[4] City Gas violated its own approved tariff to take those customers. Its tariff required City Gas to charge contributions in aid of

During the course of the FERC proceedings, City Gas and Consolidated engaged in several discussions regarding the sale and/or transportation of natural gas by City Gas to Consolidated. Although City Gas had an existing contract in effect to sell natural gas at wholesale to Florida Gas on demand for cost plus one cent per therm, it demanded cost plus ten cents per therm from Consolidated for the same service. This offer was thereafter lowered to cost plus seven cents per therm. City Gas initially rejected the notion of transporting gas to Consolidated but thereafter offered to transport at cost plus seven cents per therm. City Gas' final offer was to purchase Consolidated's system at an artificially low price or to sell gas at cost plus seven cents per therm, retracting any offer to transport gas.

The price terms City Gas proposed for the sale or transportation of natural gas were found to be the functional equivalent of a refusal to deal at all as they were wholly unreasonable and bore no relationship to any economic calculation City Gas might have made regarding its costs of providing the service or its profits on the transaction. Indeed, City Gas provides numerous types of services to various classes of customers, and its has provided service to some customers that consume far larger volumes of gas than that required by Consolidated. Moreover, City Gas had a tremendous surplus supply of natural gas it could not sell to anyone else, Consolidated's requirements were less than 1.8% of City Gas' unused annual surplus and City Gas and would have had no opportunity costs in providing this service to Consoli-

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construction if expansion costs exceeded short term revenues to be received from the customers involved by a specified margin. City Gas did not charge the contributions its tariff required in order to take Consolidated's customers, thereby improperly requiring the rest of its customers to subsidize its unprofitable expansion.

dated. City Gas would have incurred only the minimal expense of opening and maintaining a new account on its books and of reading one additional meter on a monthly basis.

On November 21, 1983, the presiding administrative judge in the FERC proceedings granted Consolidated's application, rejecting City Gas' arguments in opposition. The FERC affirmed that decision on September 19, 1984, but it ruled that Consolidated should pay the cost of the lateral connection to FGT's pipeline. The district court found that the amortization of this capital cost would have increased Consolidated's cost of securing natural gas by approximately five cents per therm and that this payment by Consolidated at that point in time "would have been impractical and unreasonable and would have severely, if not fatally, handicapped Consolidated's potential entry into the natural gas market."[5] [Pet. App. D-73]. Because City Gas had refused to transport gas and a decision to pay for the lateral was not a competitively viable alternative at that juncture, Consolidated appealed, albeit unsuccessfully, that part of the FERC's decision.

This case was initiated by Consolidated in the Southern District of Florida against City Gas under § 2 of the Sherman Act. After a non-jury trial which consumed nine full days, the district court issued extensive and detailed findings of fact and conclusions of law, holding that City

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[5] Given this factual determination by the district court that was not challenged by City Gas, City Gas' contentions throughout its petition that Consolidated could have obtained natural gas from FGT upon "reasonable conditions" conflict with the factual findings. So too is it obviously inappropriate for City Gas to attempt inject new facts into the case and to speculate at this juncture as to Consolidated's ability to finance the $250,000.00 cost and still compete, something which is clearly contrary to the record.

Gas had violated § 2 of the Sherman Act under three separate and distinct theories of liability. First, City Gas acquired and maintained monopoly power by virtue of an unlawful territorial agreement with Peoples Gas. Second, City Gas willfully maintained and abused its monopoly power by unlawfully refusing to deal with Consolidated, thereby both denying Consolidated access to an essential facility and demonstrating an intent to monopolize in violation of §2. Third, City Gas engaged in a series of six anticompetitive and predatory acts with the specific intent to monopolize which, when viewed collectively, established City Gas' abuse of monopoly power in violation of § 2.[6] The Eleventh Circuit Court of Appeals affirmed the finding of liability on all three bases. But City Gas has not challenged the finding of liability upon the third basis, thereby mandating affirmance if the finding of monopoly power is upheld.

On appeal, City Gas expressly did not challenge any of the district court's factual findings, nor did it appeal the court's finding of liability under the intent to monopolize test. Rather, City Gas merely asserted that it does

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[6] The court below upheld the district court's determination that the following acts, when viewed collectively, demonstrated City Gas' intent to monopolize in violation of § 2: (1) agreeing with Peoples not to compete with each other in their respective territories; (2) refusing to sell or transport natural gas to Consolidated at a reasonable price; (3) attempting to purchase Consolidated and eliminate it as a potential competitor; (4) acquiring two other small competitors; (5) intervening in and opposing Consolidated's FERC allocation proceedings; (6) not charging Consolidated's customers the usual contribution in aid of construction in an effort to lure those customers away. [Pet. App. A-11]. The courts below also correctly recognized that Consolidated was not required to prove that any particular anticompetitive act of City Gas, viewed in isolation, itself constituted a § 2 violation. Rather, it was only incumbent upon Consolidated to prove that City Gas had engaged in an overall pattern of anticompetitive behavior. *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984), *aff'd* 472 U.S. 585 (1985).

not possess monopoly power and it further contended that two of the acts the courts below found to be anticompetitive and in violation of § 2 even standing alone — *i.e.* the territorial agreement and the refusal to deal — were immune from antitrust liability under the state action doctrine. City Gas assumes essentially the same position in its instant petition although, as demonstrated herein, it has now seen fit to misrepresent crucial facts that were established in the district court.

REASONS WHY THE PETITION SHOULD BE DENIED

As the district court noted, following thorough evaluation of the factual evidence presented, "City Gas quite apparently believed that because it was involved in a regulated industry, it had untrammeled authority to eliminate any potential competitor within its area of operation." [Pet. App. D-27]. This observation of the district court still accurately summarizes City Gas' position. That position, however, has been thoroughly explored and rejected by this Court on numerous occasions.

Applying well established legal principles to the facts of this case, it was determined by the district court, a determination now twice affirmed by the Eleventh Circuit, that City Gas willfully acquired and maintained monopoly power in the relevant market, that it abused its monopoly power with the *specific intent* to eliminate Consolidated as a potential competitor, and that its conduct is not immune from antitrust liability under the state action doctrine. This case relies heavily on its own facts and presents no significant question of unsettled law requiring this Court's attention. City Gas, in its petition, essentially requests that this Court engage in fact finding

anew and accept a version of the facts that differs radically from that established in the district court and considered by the court of appeals — a position that is wholly inappropriate at this juncture.

The undisputed factual findings of the district court mandate a finding of monopoly power in the relevant market and it is clear that the essential facilities and state action doctrines were straightforwardly applied to the facts of this case in accordance with decisions of this Court and those of other circuit courts. Neither the analysis employed nor the decision reached conflicts with holdings of other circuit courts of appeal. Indeed, because this case relies so heavily on its own facts, it involves no broad-ranging effect on anyone other than the parties.[7]

I

CITY GAS WAS FOUND TO HAVE VIOLATED § 2 OF THE SHERMAN ACT IN ACCORDANCE WITH ESTABLISHED PRECEDENT

City Gas does not dispute the determinations of the courts below that it engaged in a pattern of anticompetitive conduct specifically designed to destroy Consolidated as a potential competitor in violation of § 2. Rather, City Gas now contends, first, that the court's factual finding that it possesses monopoly power was erroneous; second, that, as a factual matter, its pipelines were erroneously

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[7] City Gas attempts to convey the impression that the finding of § 2 liability based on its territorial agreement with Peoples has great significance beyond the instant case. In fact, as the Eleventh Circuit noted, that agreement is the only territorial agreement between natural gas utilities in Florida and, thus, the decision affects no other utilities. [Pet. App. A-11]. Moreover, because § 2 liability was found on three separate grounds, one of which remains unchallenged, a reversal on this issue would not change the outcome of this case.

held to constitute an essential facility; and third, that two of its acts which the courts below held to be violative of § 2 even standing apart from the other violations found, are entitled to immunity under the state action doctrine. To reach the conclusions City Gas advocates would require this Court either to depart from well settled law or to disregard the facts of this case.

A. City Gas Possessed Monopoly Power

Monopoly power is, of course, the power to control prices in or exclude competition from some relevant market. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *United States v. E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). The essential components of monopoly power — market definition and market power — are questions of fact. *United States v. E. I. DuPont de Nemours & Co.*, 118 F.Supp. 41, 197 (D.Del. 1953), aff'd 351 U.S. 377 (1956); *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir.), *cert. denied* 488 U.S. 870 (1988). The district court found that the relevant product market was comprised of natural gas and the geographic market consisted of City Gas' territory (within which is located Consolidated's service area) as well as the as yet unserved portions of southwest Dade County. [Pet. App. D-10]. This relevant market definition is uncontested.

On the facts of this case, there could have been no finding other than that City Gas possessed monopoly power in the relevant market based, not only its overwhelming market share, but also on the factual analysis performed of entry and exit barriers and on the examination of the realities of the regulatory scheme in place. Nevertheless, City Gas now disputes this finding by attempting to distinguish between the wholesale and retail

levels of the natural gas market and by asserting that it does not participate at the wholesale level.[8] This position both ignores the meaning of monopoly power and misstates the facts as they were established below. Moreover, as a practical matter, the distinction between wholesale and retail sales of natural gas by City Gas in the context of this case is one without any meaningful difference.

As a factual matter, City Gas' contention that it does not participate at the wholesale level of the natural gas market is, quite simply, untrue. It was established that City Gas is party to a contract wherein it agreed to sell natural gas to Florida Gas for resale upon its demand. This contract was approved by the Florida Public Service Commission and was still valid and in force at the time of trial.[9] In addition, City Gas negotiated to sell gas to

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[8] City Gas also contends that it lacks monopoly power at the retail level of the natural gas market by virtue of the fact that some aspects of its business are subject to regulation by the FERC and the FPSC. It is elementary, however, that "[a]ctivities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973). The district court found that "the fundamental realities of the situation are that City Gas has significant control over price and entrants to the retail market." [Pet.App. D-44]. City Gas' reliance on the mere existence of some regulation to overcome this finding obviously is misplaced. As the court noted in *Southern Pacific Communications Co. v. American Telephone & Telegraph Co.*, 740 F.2d 980, 1001 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985), if pricing and interconnection decisions are left to the defendant rather than to the regulatory agency in the first instance, as was found to be the case herein, then it cannot fairly be said, that a regulatory agency prevented a defendant from controlling price or excluding competition.

[9] Through his deposition taken in this case on September 18, 1985, less than one month before trial, Mr. Sidney W. Langer, Chairman of the Board and President of City Gas, testified as to City Gas' contract to sell gas for resale to Florida Gas upon its demand:

> Q. But that is actually a formal agreement that if they wanted to, you would sell it to them for one cent a therm?

Consolidated for resale. It was established in the district court that Peoples Gas sells natural gas to City Gas for resale in an area known as Breezeswept and that City Gas had the ability to sell gas for resale at will essentially without any regulatory intervention. [Pet. App. D-43]. Such wholesale rates between natural gas utilities are arrived at by the private entities, simply submitted to the FPSC for approval and, in such a situation, the FPSC does not pass on the reasonableness of the charge. [Pet. App. D-25, D-43]. Thus, the finding that City Gas had the *power* at the wholesale level to control price or exclude competition is a finding of fact that is well supported and undoubtedly sound.

City Gas now attempts to make much of the fact that it was never actually called upon to deliver gas for resale under its demand contract. This is a meaningless argument, however, that does not begin to address the real issue. As the Eleventh Circuit noted, "[t]he rather fortuitous circumstance ... that City Gas never actually sold any gas under this agreement does not obscure the fact that it had the *power* to do so." [Pet. App. A-5]. Indeed, within the relevant geographic market, the court found that City Gas was the *only* source of natural gas available to Consolidated, thereby mandating the conclusion that City Gas had power in this market.

Moreover, for City Gas to suggest that sales at "wholesale" somehow differ from sales at "retail" deliberately ignores the reality. As its own tariff demonstrated,

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A. That is right, including right this minute...

In this particular case, I guarantee you we had permission from the Public Service Commission to do this deal. Otherwise, it could never be done.

[P. Ex. M-0005 at p.174].

City Gas offered at least five different classes of service to its customers, all at varying rates. [P. Ex. D-0001]. The district court noted that, up until 1981, City Gas' largest industrial customer, Lonestar Cement, had been making annual natural gas purchases of approximately 27 million therms, as compared to the approximately one-half million therms that Consolidated required annually. [Pet. App. D-26].[10]. The court found that all that would have been involved in selling to Consolidated was opening and maintaining one new account on the books at the particular rate charged and reading one additional meter on a monthly basis. [Pet. App. D-24]. The process would be exactly the same as far as City Gas was concerned, regardless of whether sale of gas was to Consolidated or to any of its other approximately 100,000 smaller or larger customers.

There exists no viable basis upon which the finding of City Gas' monopoly power in the relevant market credibly can be challenged. Although City Gas claims that two of the three separate bases upon which § 2 liability was premised — *i.e.* the territorial agreement and refusal to deal — constitute conduct that is immune from antitrust liability, City Gas has never claimed this immunity defense is applicable to the third basis of liability — the pattern of anticompetitive conduct in which it engaged. As the district court found and the Eleventh Circuit affirmed, City Gas engaged in a series of predatory acts designed to eliminate competition which, when viewed

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[10] As the court found, prior to FERC's grant of a gas allocation to Consolidated, City Gas could have supplied gas to meet Consolidated's need by using only 1.8% of its *excess* annual gas supply it otherwise could not use. After Consolidated received an allocation, City Gas could have transported gas to Consolidated, thereby consuming none of its own allocation. [Pet. App. D-26].

collectively, constituted an abuse of monopoly power and provided a separate and distinct basis for imposition of § 2 liability. Thus, regardless of any other position asserted by City Gas, a finding of monopoly power mandates a finding of § 2 liability on this third ground.[11]

(B) The Essential Facilities Doctrine Was Properly Applied

When one reviews the district court's recitation of the facts of this case, it is difficult to conceive of a situation that falls more squarely within the essential facilities doctrine as articulated in *Otter Tail Power Co. v. United States,* 410 U.S. 336 (1973) and its progeny. Nevertheless, City Gas claims that the court's finding of § 2 liability under the essential facilities doctrine is erroneous on two levels. First, City Gas once again disputes the district court's factual finding that it participates in and has power at the wholesale level of the natural gas market and it claims that the essential facilities doctrine, therefore, is inapplicable because City Gas is not vertically integrated. Second, City Gas challenges the district court's factual finding that its pipelines were essential to Consolidated ability to compete. Neither of these positions has any merit whatsoever.

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[11]The law is well settled that even where a regulated industry has acquired monopoly power lawfully, it is nevertheless strictly accountable for its use of that power and may not abuse lawfully acquired monopoly power by engaging in anti-competitive conduct. *See e.g., Otter Tail Power, supra; United States v. American Tel. & Tel. Co.,* 524 F.Supp. 1336, 1347-48 (D. D.C. 1981); *Bergjans Farm Dairy Co. v. Sanitary Milk Producers,* 241 F.Supp. 476, 485 (E.D. Mo. 1965), *aff'd* 368 F.2d 679 (8th Cir. 1966); *Greyhound Computer Corp., Inc. v. International Business Machines Corp.,* 559 F.2d 488, 498 (9th Cir. 1977), *cert. denied* 434 U.S. 1040 (1978). The courts below found and affirmed that City Gas abused its monopoly power, even if lawfully acquired, and that determination has not been challenged on appeal or in City Gas' instant petition.

City Gas relies upon Judge Tjoflat's dissenting opinion below to support its position that it is not vertically integrated because it does not operate at the wholesale level of the natural gas market. With all due respect to Judge Tjoflat, his dissenting analysis and conclusions are based on an erroneously stated factual background and on the erroneous premise that City Gas does not participate in the wholesale natural gas market and has never done so. Judge Tjoflat consistently refers to City Gas' contract to sell gas to Florida Gas for resale as having been "abandoned". That statement is unsupported and, indeed, is directly in conflict with the uncontested facts. As set forth above, it was established that the contract between City Gas and Florida Gas remained in force at the time of trial and City Gas' president testified that, had demand been made at that very moment, City Gas would have sold to Florida Gas pursuant to the contract.

Judge Tjoflat's vertical integration argument, upon which City Gas relies, is particularly inappropriate in the context of this case for another reason as well. City Gas attempts to convey the false impression that the decision below requires it to change the nature of its operations and to enter a market where its has never before participated. As explained above, City Gas already sells to at least five different classes of customers, all at different rates that have been approved by the FPSC, and the FPSC approved the rate at which City Gas contracted to sell to Florida Gas for its resale. Sale to Consolidated would not have entailed any change in City Gas' operations but merely would have added one new customer on its books and one more meter to read each month as the district court found. [Pet. App. D-24].

Finally, City Gas improperly takes issue with the factual finding below that its pipeline is an essential

facility — *i.e.* that duplication of the facility by Consolidated is economically infeasible and that denial of its use inflicts a severe handicap on Consolidated as a potential entrant into the natural gas market. *See Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied* 436 U.S. 956 (1978).[12] In cavalierly contending that Consolidated could easily have paid the $250,000.00 necessary to build the lateral connection to FGT, City Gas falsely states that the district court found that this expenditure would have increased Consolidated's market value by approximately $1.5 million. *The court found no such thing.* Rather, the district court found that the difference between what Consolidated's value would have been *in the absence of City Gas' actions* and its market value following City Gas' illegal conduct was approximately $1.5 million. [Pet. App. D-33].

Contrary to City Gas' unsupported contentions, the district court specifically found that, during 1982 and 1983, while it was seeking to compete for customers with City Gas and prior to 1984 when Consolidated received its FERC allocation, Consolidated could not have purchased natural gas for resale from anyone but City Gas. No other source was available while City Gas delayed the FERC proceedings. After 1984 when it received the FERC allocation, Consolidated could have also purchased from FGT had it expended $250,000.00 for a new gate station. But the Court found that City Gas had already taken all of Consolidated's commercial customers by that time and that such an expenditure, as a matter of fact, would then

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[12] As noted above, the courts below found that City Gas' refusal to deal with Consolidated on reasonable terms violated § 2, not only under the essential facilities doctrine, but also under the intent test. City Gas does not challenge the holding that its conduct demonstrates an intent to monopolize in violation of § 2.

have rendered it unable effectively to compete with City Gas. [Pet. App. D-72]. As the court found: "such duplication would have been impractical and unreasonable and would have severely, if not fatally, handicapped Consolidated's potential entry into the natural gas market." [Pet. App. D-731]. The test for finding a facility to be essential clearly has been met on the facts of this case and City Gas' attempt to change the facts at this juncture is improper and inappropriate.

II

CITY GAS' STATE ACTION DEFENSE WAS PROPERLY REJECTED IN ACCORDANCE WITH THIS COURT'S PRECEDENTS

City Gas claims that two of the three bases upon which it was found to have violated § 2 are entitled to immunity under the state action doctrine. Because no immunity is claimed as to the other violation found, the outcome of this case would necessarily remain unchanged even if City Gas' immunity argument is accepted. Nevertheless, City Gas' analysis of the immunity issue is flawed and, as with its other arguments, depends upon a factual recitation that is in direct conflict with those facts established in the district court below.

As this Court has clearly ruled, "a claim of immunity or exemption [from the antitrust laws] is in the nature of an affirmative defense." *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 600 (1976). Repeals of the antitrust laws through implication from a state or federal regulatory scheme are not favored. *Cantor* at 596 n.34; *Otter Tail* at 391. Thus, the party asserting such an affirmative defense bears a heavy burden of making a "convincing showing of

clear repugnancy between the antitrust laws and the regulatory system." *Cantor* at 597, n.37.

Despite City Gas' deficiencies in both pleading and proof,[13] the district court engaged in a thorough analysis of the defense and found it inapplicable to City Gas' conduct in this case. For its otherwise illegal conduct to be immune from antitrust scrutiny, a regulated business must prove, first, that the conduct was undertaken pursuant to a "clearly articulated and affirmatively expressed" policy of the state to displace competition and, second, that the *conduct in question* is "actively supervised" by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). When this two prong test is accurately applied to the facts of this case, the conclusion is mandated that City Gas' conduct is not immune.

A. City Gas Failed to Satisfy the Clear Articulation Standard of the Midcal Test

Although City Gas does not claim immunity with respect to the pattern of anticompetitive conduct held to violate § 2 under the intent test, it does contend that the court below erred in finding that the first prong of the *Midcal* test was not satisfied as to its territorial agreement with Peoples and its refusal to deal with Consolidated viewed in isolation of its other actions. The test, however, was correctly applied to the facts of this case in accordance with decisions of this Court.

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[13] The district court noted that, while the state action exemption was not "squarely asserted" by City Gas, the issue was indeed serious and thus required thorough analysis. [Pet. App. D-50].

1. Territorial Agreement

City Gas' attack on application of the clear articulation test is twofold. First, City Gas states that the Florida Supreme Court ruled in *City Gas Co. v. Peoples Gas System, Inc.*, 182 So.2d 429 (Fla. 1965) that the Florida legislature intended for natural gas utilities to enjoy exclusive territorial agreements. The Florida Supreme Court, however, said no such thing. Second, City Gas states that dispositive of this case is this Court's pronouncement in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64 (1985) that "[a]s long as the state as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied." This contention is based on an erroneous factual premise for which there is no support in the record.

In 1960 when City Gas and Peoples entered into their agreement not to compete in each other's territory, no Florida statute, rule or judicial decision authorized such agreements or provided any approval process. The territorial agreement did not provide that FPSC approval was necessary in order for it to become effective. However, sometime after City Gas and Peoples executed the agreement they requested and received FPSC approval. Some five years later, because City Gas and Peoples became embroiled in litigation over the agreement, the Florida Supreme Court ultimately considered it and held that the FPSC had implied authority to validate the agreement.

It is clear that an after-the-fact stamp of approval on the territorial agreement could not serve to immunize the then five year old agreement from antitrust consequences. As this Court stated in *Parker v. Brown*, 317 U.S. 341, 351

(1943), a state does not give immunity to those who violate the Sherman Act by declaring that their action is lawful. *See also Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 39 (1985) (the state may not validate anticompetitive conduct by declaring it to be lawful).

In deciding whether the first prong of *Midcal* has been satisfied, a federal court is not bound by any state court decision on the subject as it is deciding a question of federal antitrust law. *See Town of Hallie* at 44; *Racetrac Petroleum, Inc. v. Prince George's County,* 601 F. Supp 892, 907 n.16 (D. Md. 1985), *aff'd* 786 F.2d 202 (4th Cir. 1986). Rather, the state court decision must be referred to as part of a full, independent determination as to whether there is a clearly articulated and affirmatively expressed policy of the state to displace competition. There is no such policy in this instance and, thus, *Southern Motor Carriers* clearly is not dispositive as City Gas contends.

It was established in the district court that "[w]hile City Gas and Peoples do not compete with each other, they are not precluded from competing with other smaller natural gas companies within the service areas which each reserved to itself under their agreement." [Pet. App. D-12]. Neither the agreement, the FPSC's approval nor the Florida Supreme Court's ruling as to the agreement in any way purport to exclude or authorize the exclusion of any other gas company from competing within the spheres of influence selected by City Gas and Peoples Gas. The Florida Supreme Court's opinion never even mentions the words exclusive territory nor does it address any authority for natural gas companies to acquire

exclusive territories free from competition.[14] There exists no indication of legislative intent or other sovereign authority to displace competition between gas utilities and City Gas' reliance on the Florida Supreme Court's decision is thus misplaced.

Finally, City Gas attempts to bolster its contention that the FPSC always had implied authority to approve territorial agreements between natural gas utilities through the fact that, in 1989, the Florida legislature amended Chapter 366 of the Florida Statutes and established a policy whereby the FPSC is granted the express authority to approve territorial agreements between natural gas utilities. 1989 Fla. Laws, Ch. 89-292, § 2, Fla. Stat. § 366.04(3)(a) and (b). City Gas' apparent reliance on this recent statutory amendment to bolster its position in the instant case, however, is misplaced. As this Court has made clear, the views of a subsequent legislature "form a hazardous basis for inferring the intent of an earlier one." *United States v. Price,* 361 U.S. 304, 313 (1960). The fact that the Florida legislature granted the FPSC authority to approve territorial agreements between natural gas utilities in 1989 clearly does not justify any inference that this amendment merely constitutes a clarification of pre-existing authority as of 1960. To the contrary, the legislature expressly provided that "[n]othing in this act shall be construed to affect the outcome of litigation commenced prior to the effective date of this act [October 1, 1989]," 1989 Fla. Laws, Ch. 89-292, § 21, thereby clearly

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[14] The headnotes to the decision do use the words "exclusive service agreement" but no such language appears in the Florida Supreme Court's opinion. To the extent headnotes misconstrue the holding of the court in Florida, they are to be disregarded. *Stauf v. Holden,* 94 So.2d 361, 362 (Fla. 1957) (en banc); *Knight v. State,* 217 So.2d 124, 126 (Fla.2d DCA 1968).

indicating that the authority granted is *new*. If, as City Gas contends, the FPSC always had the authority to approve territorial agreements and the need for this statutory amendment emanated from the decisions of the lower courts in this case, then the legislature certainly would have intended that this litigation be affected. The legislature, however, said just the opposite.

2. Refusal to Deal

City Gas argues that it was entitled to refuse to sell natural gas to Consolidated pursuant to a clearly articulated state policy in that Fla. Stat. § 366.03 states, in part, that "no public utility shall be required to furnish electricity or gas for resale . . ." Even though City Gas failed to clearly raise the immunity doctrine as to that conduct, the trial court, on its own, analyzed this same statute and correctly determined that it did not immunize City Gas' refusal to sell gas to Consolidated upon reasonable terms in view of its control of an essential facility without which Consolidated could not compete.

At the outset, it must be noted that the statute could not have the effect of immunizing City Gas' conduct in this case. City Gas did not refuse to sell gas to Consolidated, in reliance upon the statute. Instead, it offered to sell gas to Consolidated for resale but at a price so extortionately high that the trial court found that its price demand was tantamount to a refusal. The statute at issue clearly was never intended to permit extortionately high price demands to be immunized from actionability.

Second, as set forth in *Town of Hallie v. City of Eau Claire,* 471 U.S. at 42-44, the first prong of *Midcal* is not met unless the legislature contemplated the type of anti-competitive conduct that flows from the statute. The trial

court analyzed the history of the statute and found that the requisite foreseeability certainly is not apparent with respect to Fla. Stat. § 366.03. [Pet. App. D-81-82]. Thus, the basic premise that prompted the authorization contained in Fla. Stat. § 366.03 has no application to the refusal of a natural gas utility to sell to a competitor.

Finally, by its own terms, the statute has no application at all to City Gas' refusal to *transport* gas nor is there any policy underlying the statute arguably broad enough to cover City Gas' refusal to transport. Such repeals of the antitrust laws by implication are not favored. It simply cannot be said that there is a Florida policy articulated in any fashion that requires or even permits a natural gas utility having monopoly power to refuse to allow a competitor access to an essential facility, in clear violation of federal antitrust policies.

B. City Gas Failed to Satisfy the Active Supervision Prong of the Midcal Test

City Gas' failure to satisfy *Midcal's* first prong renders consideration of the second prong unnecessary. Nevertheless, the conclusion below that the active supervision prong of *Midcal* is not satisfied either as to the territorial agreement or as to the refusal to deal is one that clearly is consistent with the legal principles on the subject that have been articulated by this Court.

By definition, the question of "active supervision" is one of fact. Only if the agency with the power to regulate is exercising that power sufficiently to offset the otherwise harmful effects of an absence of competition can that absence be tolerated. 1 P. Areeda & D. Turner, *Antitrust Law* § 213a (1978). The state supervision requirement "serves an essentially evidentiary function: it is one way

of ensuring that the actor is engaging in the challenged conduct pursuant to state policy. *Town of Hallie v. City of Eau Claire,* 471 U.S. at 46. Thus, "[t]he mere presence of some state involvement or monitoring does not suffice." *Patrick v. Burget,* 486 U.S. 94, 101 (1988). The factual determination below that the involvement of the FPSC in the challenged conduct falls woefully short of constituting active supervision simply is not overcome by City Gas' unsupported protestations to the contrary.

1. Territorial Agreement

Contrary to City Gas' misstatement that the territorial agreement between City Gas and Peoples would have been void absent FPSC approval, the trial court determined that the agreement was not required to be submitted to the FPSC to become effective. [Pet. App. D-67]. The court found that the FPSC considered the agreement only when someone complained and not on its own initiative. *Id.* Indeed, the FPSC has established no standards for the creation of territorial agreements and its supervision of the agreement is, at best, on a sporatic basis. *Id.*

In addition to the foregoing factual determination regarding the lack of FPSC supervision of territorial agreements, the lower courts also considered the statement of the FPSC as to its own authority that "[i]t is not clear that [it] has the statutory authority to either establish service territories for natural gas utilities (as it does for telephone, water and sewer utilities) or resolve territorial disputes between natural gas utilities (as specifically authorized for electric utilities)." [Pet. App. D-64; A-10]. Clearly, a federal court could not possibly hold that the FPSC is actively supervising service territories or territorial disputes between natural gas companies in the face of the evidence to the contrary and in light of the

FPSC's own statement that it is not clear that it has any authority to do so. Under these conditions, supervision could not be sufficiently active to totally remove all such matters from the reach of the antitrust laws. As the court below explained, based on the clear evidence in the record, "[t]his is at bottom an agreement entered into by private parties, in pursuit of their own economic interests, that is neither authorized by the state, nor closely monitored by it." [Pet. App. A-11].

2. Refusal to Deal

City Gas argues that because Fla. Stat. § 366.03 authorizes it to refuse to sell gas for resale, there is nothing left to be supervised. The evidentiary test for antitrust immunity cannot be so lightly dismissed, however. As this Court stated in *Midcal,* is not sufficient that the state merely authorize private parties to engage in the challenged conduct without further review or regulation. Rather, the policy which authorized the challenged conduct must be actively supervised by the state and the state at the very least, must monitor market conditions, review the reasonableness of the conduct, and engage in "pointed re-examination of its policy." 445 U.S. at 105. As the courts below found, there simply is no evidence that the authorization given gas utilities to refuse to sell gas for resale has ever been re-examined in light of changing market conditions so as to constitute active state supervision.

Even if Fla. Stat. § 336.03 was seen to authorize a gas utility's refusal to sell natural gas for resale, it certainly does not prohibit such sales. City Gas argues that if the utility *elects* to sell gas for resale, the terms and conditions of that sale must be approved by the FPSC, thereby demonstrating the existence of adequate

supervision. Once again, City Gas' argument is contrary to the record. It was demonstrated in the trial court that the FPSC has approved prices for the resale of natural gas between natural gas utilities of both one cent over cost and seven cents over cost and no explanation was offered for this disparity. [Pet. App. D-82]. The trial court found that the FPSC's approval of such arrangements between two natural gas utilities is virtually automatic, without any analysis of the reasonableness of the bargain struck in light of competitive conditions or competitive factors. *Id.* As the court below noted, this Court "has consistently contemplated a more vigorous, probing supervision than mere acquiescence." [Pet. App. A-11].

III

CITY GAS ABUSED ITS MONOPOLY POWER

Regardless of the source of its monopoly power or of whether that power was acquired lawfully as a consequence of regulation or unlawfully, City Gas is nevertheless strictly accountable for its abuse of that power to foreclose or eliminate competition. *See Otter Tail, supra; Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476 (E.D. Mo. 1965), *aff'd* 368 F.2d 679 (8th Cir. 1966); *Greyhound Computer Corp., Inc. v. International Business Machines Corp.*, 559 F.2d 488, 498 (9th Cir. 1977), *cert. denied* 434 U.S. 1040 (1978). Thus, even where a public utility enjoys a lawful monopoly, the court must inquire into whether the defendant *abused* its monopoly power by engaging in anticompetitive conduct. *See Continental Cablevision of Ohio, Inc. v. American Electric Power Co.*, 715 F.2d 1115, 1120-21 (6th Cir. 1983).

On the basis of *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984), *aff'd*

472 U.S. 585 (1985), the courts below properly held that Consolidated was not required to prove that *any* particular anticompetitive act of City Gas, viewed in isolation, itself constituted a § 2 violation. Rather, it was only incumbent upon Consolidated to prove that "City Gas has engaged in an overall pattern of anticompetitive behavior." R7-165-94. As the court explained in *Aspen Highlands*, in rejecting an argument that each of the "six things" on which the plaintiff relied to demonstrate deliberate exclusion from the relevant market must be supported by sufficient evidence for a § 2 verdict:

> We cannot agree that each one of the "six things" which plaintiff argued demonstrated abuse of monopoly power, taken alone, must be supported by sufficient evidence to find a § 2 violation. . . .
>
> [D]efendant's argument would require that we view each of the "six things" in isolation. To do this, however, would be contrary to the Supreme Court's admonition that an antitrust plaintiff "should be given the full benefit of [its] proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." Plaintiff's evidence should be viewed as a whole. Each of the "six things" viewed in isolation need not be supported by sufficient evidence to amount to a § 2 violation.

738 F.2d at 1522 n.18 (citations omitted).

The Eleventh Circuit affirmed the district court's determination that City Gas abused its monopoly power, stating:

> The district court found that City Gas abused its power by the following six acts.

1. By agreeing in 1960 with Peoples Gas not to compete with each other in their respective territories in the sale of natural gas.

2. By refusing to sell or transport natural gas to Consolidated at a reasonable price.

3. By attempting to purchase Consolidated and eliminate it as a potential competitor.

4. By acquiring two other small competitors.

5. By intervening in and opposing Consolidated's FERC allocation proceedings seeking permission to sell natural gas.

6. By not charging Consolidated's customers the usual "contribution in aid of construction" to extend service to them in an effort to lure Consolidated's customers away.

The court found that the first three acts were the primary instances of anticompetitive conduct, but stated that the last three, when viewed with the principal acts, further evidenced City Gas' intent to monopolize. These are anticompetitive acts which demonstrate an intent by City Gas to exercise monopoly power. The district court properly held that City Gas was not protected from the antitrust consequences of these acts.

[Pet. App. A-12].

City Gas has failed to challenge this basis of liability on appeal. Thus, a finding of monopoly power mandates affirmance of the determination that City Gas is liable for violation of § 2 of the Sherman Act.

CONCLUSION

Although City Gas purports only to challenge the application of legal principles to the facts of this case, all that is truly challenged in the petition are the factual findings of the trial court. When the established facts are considered, it is clear that this case is fully in accord with settled antitrust principles and there exist neither conflicts requiring this Court's resolution nor questions of unsettled law requiring Court's attention. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

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